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No. 92-_____

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1992

MELVILLE O'NEAL ATKINSON, PETITIONER

v.

UNITED STATES OF AMERICA, RESPONDENT

PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Whether 16 U.S.C. Section 3373(d) of the Lacey Act was properly construed so as to permit the price paid for guiding services to be used in determining the "market value" of the wildlife?

2. Whether the jury instruction providing for two methods in determining the "market value" of wildlife was ambiguous and thereby violated the Fifth and Sixth Amendments to the United States Constitution?

3. Whether the application to the Petitioner of Amendment Number 407 of Section 2Q2.1 of the Federal Sentencing Guidelines violated the Ex Post Facto Clause of the United States Constitution?

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COMES NOW the Petitioner, Melville O'Neal Atkinson, and respectfully prays that the Supreme Court of the United States issue a Writ of Certiorari to review the Judgment of the United States Court of Appeals for the Ninth Circuit.

REPORT OF OPINIONS BELOW

On April 27, 1992, the United States Court of Appeals for the Ninth Circuit issued its opinion in Cause No. 91-30084 in which the United States Court of Appeals for the Ninth Circuit affirmed the conviction and sentence of Melville O'Neal Atkinson. A copy of the opinion is set forth in the appendix as Exhibit "B". A timely Petition for Rehearing was filed on behalf of Mr. Atkinson which was eventually denied on July 17, 1992. On July 22, 1992, the United States Court of Appeals for the Ninth Circuit issued its Order and

Amended Opinion in Cause No. 91-30084. A copy of the Order and Amended Opinion is set forth in the appendix as Exhibit "A". This Amended Opinion can now be properly cited as *U.S. v. Atkinson*, 966 F.2d 1270 (9th Cir. 1992).

JURISDICTION

The Order and Amended Opinion of the United States Court of Appeals for the Ninth Circuit was filed on July 22, 1992. A timely Petition for Rehearing was denied on September 10, 1992. This Petition for Writ of Certiorari, which is mailed on December 9, 1992, is timely as required by Supreme Court Rule 13.1 and Rule 13.4.

The jurisdiction of this Court is invoked under 28 U.S.C. Section 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS

United States Constitution, Article I, Section 9(3)

(Pertinent text set forth in the Appendix)

United States Constitution, Fifth Amendment

(Pertinent text set forth in the Appendix)

United States Constitution, Sixth Amendment

(Pertinent text set forth in the Appendix)

Lacey Act - 16 U.S.C. Section 3372

(Pertinent text set forth in the Appendix)

1988 Amendments to 16 U.S.C. Section 3372

(Pertinent text set forth in the Appendix)

Lacey Act - 16 U.S.C. Section 3373

(Pertinent text set forth in the Appendix)

1988 Amendments to 16 U.S.C. Section 3373

(Pertinent text set forth in the Appendix)

Section 2Q2.1 of Federal Sentencing Guidelines

(Pertinent text set forth in the Appendix)

Amended Section 2Q2.1 of Federal Sentencing Guidelines

(Pertinent text set forth in the Appendix)

STATEMENT OF THE CASE

A. Statement of the Facts

The Petitioner, Melville O'Neal Atkinson, owned and operated Neal's Wilderness Outfitters, Inc., a Jacksonville, Florida business which acted as a booking agent for hunting expeditions in the State of Montana. Arrangements would then be made to have the actual guiding of the hunters performed by Montana outfitters or landowners. In November of 1989, Mr. Atkinson booked a number of hunters from the southeast portion of the United States to hunt in Montana.

Most hunters paid the standard booking fee of One Thousand Five Hundred and No/100ths ($1,500.00) Dollars. The booking fee was then to be split with the outfitter or landowner, who in this case were Wayne Bacon and Brian Nelson. Lodging, meals, and ground transportation were included in the booking fee.

During the hunts in November of 1989, it was alleged that approximately 14 deer were illegally taken in violation of the Lacey Act, specifically a violation of 16 U.S.C. Section 3372 and Section 3373. The Indictment filed against Mr. Atkinson, a copy of which is included in the Appendix, alleged eight counts of conspiracy to violate the Lacey Act coupled with 13 counts of either attempted violation of the Lacey Act or aiding and abetting the violation of the Lacey Act. Atkinson was tried before a jury, was convicted on all 21 counts, and he was sentenced to a term of 37

months imprisonment. He appealed his conviction and sentence to the United States Court of Appeals for the Ninth Circuit on various grounds, two of which were the "market value" issue and the Federal Sentencing Guideline issue. As previously stated, the United States Court of Appeals for the Ninth Circuit affirmed the conviction and sentence of Mr. Atkinson.

B. Jurisdiction in Court of First Instance

The basis for federal jurisdiction in the Court of first instance, the United States District Court for the District of Montana, Billings Division, is the alleged violations of federal statutes, namely 16 U.S.C. Sections 3372 and 3373 and 18 U.S.C. Section 371.

ARGUMENT

A. Introduction

The Petition for Writ of Certiorari filed in this case concerns the construction and interpretation of the Lacey Act, specifically 16 U.S.C. Sections 3372 and 3373, together with the corresponding Federal Sentencing Guideline. As a review of Section 3372 and Section 3373 reveals, these particular sections are concerned with the trafficking of illegally taken wildlife. Although at first blush it would appear that the Lacey Act has little impact upon and is of little importance to most citizens, namely those who live in urban areas, it is crucial to point out the fact that it is precisely these urban citizens, who travel to the sparsely populated West to hunt, that the Lacey Act is most often applied due to the fact that the out-of-state hunter who

transports part of his wildlife home conveniently satisfies the interstate commerce element of the Lacey Act.

As the number of Lacey Act prosecutions have increased, so has the frequency of various legal issues, most predominately the valuation issue. Although Congress attempted to amend the Lacey Act following the decision by the United States Court of Appeals in *U.S. v. Stenberg*, 803 F.2d 422 (9th Cir. 1986), Congress has seemed to only complicate and perpetuate the issues, especially as to the element of "market value." The United States Court of Appeals for the Ninth Circuit has decided an important question of federal law regarding the issue of valuation and the Lacey Act, and the Petitioner, Mr. Atkinson, sincerely believes that this questions which has not been, but should be, settled by this Honorable Court.

B. Questions Presented for Review

1. Whether 16 U.S.C. Section 3373(d) of the Lacey Act was properly construed so as to permit the price paid for guiding services to be used in determining the "market value" of the wildlife?

Mr. Atkinson was charged in this case with several violations of 16 U.S.C. Section 3372(2)(A) which provides:

> "It is unlawful for any person ... (2) to import, export, transport, sell, receive, acquire, or purchase in interstate or foreign commerce (A) any fish or wildlife taken, possessed, transported, or sold in violation of any law or regulation of any state or in violation of any foreign law. . . ."

While the substantive offense is set forth in Section 3372, the penalty provisions are set forth in a separate

section, namely 16 U.S.C. Section 3373(d)(1) which provides:

> "Any person who --
>
> (A) . . . or,
>
> (B) violates any provision of this chapter (other than subsections (b) and (d) of Section 3372 of this title) by knowingly engaging in conduct that involves the sale or purchase of, the offer of sale or purchase of, or the intent to sell or purchase, fish or wildlife or plants with a market value in excess of $350,
>
> knowing that the fish or wildlife or plants were taken, possessed, transported, or sold in violation of, or in a manner unlawful under, any underlying law, treaty or regulation, shall be fined not more than $20,000, or imprisoned for not more than five years, or both. Each violation shall be a

> separate offense and the offense shall be deemed to have been committed not only in the district where the violation first occurred, but also in any district in which the defendant may have taken or been in possession of the said fish or wildlife or plants."

Therefore, it should initially be noted that the Lacey Act provides for the substantive violation in one section and the penalty provisions in another, and market value is only mentioned in the penalty provisions of Section 3373.

In 1986, the United States Court of Appeals for the Ninth Circuit rendered its opinion in *U.S. v. Stenberg*, 803 F.2d 422 (9th Cir. 1986). In *Stenberg* the Court held that the Lacey Act's prohibition of the "sale of wildlife" did not apply to the sale of guiding services

or hunting permits. Mr. Stenberg also challenged the jury instruction dealing with "market value."

> "The District Court instructed the jury that:
>
> The market value of wildlife may be established by several methods.
>
> One method is, of course, the price a piece of property would bring if sold on the open market between willing buyer and seller.
>
> Another method to establish market value is the price paid for guiding services for the hunt in which the wildlife was taken.
>
> Either of the above methods is a proper method to use in determining market value."

Mr. Fike contended that the Court's instruction failed to provide an appropriate standard for assessing the

market value of the wildlife, and the Court responded at page 433 as follows:

> "Because we reverse Fike's conviction on the only count on which evidence was introduced as to 'the price paid for guiding services,' *infra* section VI, we need not consider the third paragraph of the court's instruction. The second paragraph of the instruction, which governed the deliberations on all other counts, required the jury to determine the price the wildlife would bring 'if sold on the open market between a willing buyer and seller.' This formulation corresponds to typical definition of 'market value.' *See, e.g.,* 55 C.J.S. *Market* at 789-97 (1948) (citing cases); Black's Law Dictionary 1123 (4th ed. rev. 1976. ..."

In other words, the United States Court of Appeals chose not to determine whether market value could be

established by looking at the price paid for guiding services for the hunt in which the wildlife was taken. Nevertheless, the Court did find appropriate the determination of market value as the price the wildlife would bring if sold on the open market between a willing buyer and seller.

In response to the decision in *Stenberg*, 16 U.S.C. Section 3372 was amended in 1988 to include a provision concerning sale and purchase of guiding and outfitting services and invalid licenses and permits. 16 U.S.C. Section 3373(c) provided:

> "(c) **Sale and purchase of guiding and outfitting services and invalid licenses and permits**
>
> (1) **Sale**
>
> It is deemed to be a sale of fish or wildlife in violation of this chapter for a person for money or other

consideration to offer or provide --

(A) guiding, outfitting, or other services; or

(B) a hunting or fishing license or permit;

for the illegal taking, acquiring, receiving, transporting, or possessing of fish or wildlife.

(2) Purchase

It is deemed to be a purchase of fish or wildlife in violation of this chapter for a person to obtain for money or other consideration --

(A) guiding, outfitting, or other services; or

(B) a hunting or fishing license or permit;

> for the illegal taking, acquiring, receiving, transporting, or possessing of fish or wildlife." 16 U.S.C. Section 3373(c)(1)(A), (B)."

It is critical to an understanding of Mr. Atkinson's argument that the amendments which were the result of the *Stenberg* decision concerned only the substantive offense as described in Section 3372, and there were no corresponding amendments to the penalty provisions set forth in Section 3373. Nevertheless, the United States of America attempted to do what Congress refused or failed to do by arguing that market value may be determined by looking to the money paid for guiding or outfitting services or the money paid for a hunting or fishing license. However, the penalty provisions as set forth in Section 3373 were not amended to include this rather expansive definition

of "market value." As stated by the Court in *Stenberg* one of the oldest and most settled rules of statutory construction is the principal that criminal laws are to be strictly construed. See *Busic v. United States*, 446 U.S. 398 (1980). Therefore, even though Congress was aware of the special problems created by the sale of guiding and outfitting services it chose not to amend the penalty provisions of Section 3373. As a result, although Mr. Atkinson clearly agrees that the sale of guiding and outfitting services may not be a violation of the Lacey Act if all other elements are proven, the price paid for guiding and outfitting services cannot be used in determining the "market value" of the wildlife sold.

2. Whether the jury instruction providing for two methods in determining the "market value" of

wildlife was ambiguous and thereby violated the Fifth and Sixth Amendments to the United States Constitution?

If this Honorable Court determines that it is proper to construe 16 U.S.C. Section 3373 so as to permit the price paid for guiding services to be used in determining the market value of the wildlife, then the question becomes whether the jury instruction given at the trial of this case providing for two methods in determining "market value" was ambiguous and thereby violated the Fifth and Sixth Amendments to the United States Constitution. In this particular case, Instruction No. 50 sets forth the two methods by which the "market value" of the wildlife may be determined and stated:

> "The market value of wildlife may be established by several methods.

> One method is, of course, the price a piece of property would bring if sold on the open market between a willing buyer and seller.
>
> Another method to establish market vlaue is the price paid for guiding services for the hunt in which the wildlife was taken.
>
> Either of the above methods is a proper method to use in determining market value."

This instruction, identical to that given in *Stenberg*, was proposed by the Government and was objected to by counsel for Mr. Atkinson.

In order to understand the question presented by the Petitioner, it is important to point out what language from the instruction is objectionable, and what language is not objectionable. First, Mr. Atkinson did

not at the time of trial and does not now object to the definition of "market value" as the "price a piece of property would bring if sold on the open market between a willing buyer and seller." On the other hand, the language which is objectionable is that "market value" is defined as "the price paid for guiding services for the hunt in which the wildlife was taken." It is precisely this language which Mr. Atkinson contends is vague and ambiguous. One may ask, how so? Such a question is best answered by asking a series of follow up questions which include: What does "price paid for guiding services for the hunt" mean? Does that mean the total fee paid by the hunter? Should the cost of lodging be deducted from the fee because it is not "guiding services"? Should the amount paid for meals and ground transportation be deducted because they are not "guiding services"? If the hunter

goes on two separate hunts and kills two deer, is the amount paid for the guiding services divided by two? If the hunter is guided by two guides, is the price paid for guide services again divided by two? And, is the amount paid by the hunter for licenses, airline tickets, and taxidermy to be included in the "price paid for guiding services"? These are not remote or farfetched questions, but rather are precisely the questions a competent juror would have asked himself or herself during deliberations in the Atkinson case. At the same time, the instruction offers the juror no guidance whatsoever in answering these questions.

It has been stated time and again that the Court must explain all terms of legal significance. See *United States v. Anderton*, 629 F.2d 1044, 1049 and n.5 (5th Cir. 1980). It is undisputed that the jurisdictional amount of Three Hundred Fifty and No/100ths

($350.00) Dollars is, indeed, significant in light of the fact that criminal sanctions are imposed only if the "market value" exceeds Three Hundred Fifty and No/100ths ($350.00). While providing the jury a definition on essential elements is designed to reduce uncertainty, just the opposite occurred here. The United States Court of Appeals for the Ninth Circuit in *U.S. v. Combs*, 762 F.2d 1343 (9th Cir. 1985) addressed a somewhat similar situation and stated at page 1346:

> "It is the duty of the district court to instruct the jury on all the essential elements of the crime charged. *United States v. Bryant*, 461 F.2d 912, 920 (6th Cir. 1972). *See also United States v. Mastelotto*, 717 F.2d 1238, 1248 (9th Cir. 1983). When a person is prosecuted under a statute, the requirements of the statute should be explained to the jury so that they may determine whether or not

the defendant's conduct fits within the statute. *Bryant,* 461 F.2d at 920; *Morris v. United States*, 156 F.2d 525, 529, 531 (9th Cir. 1946). 'A jury may not justifiably find a verdict until they are instructed on the law, sufficiently to show them what is necessary for proof.' *Morris*, 156 F.2d at 531. The court's instruction in this case was so lacking in explanation of the offense charged and its elements that it was fundamentally erroneous and inadequate. *Id. Cf. United States v. Ramsey*, 291 F.2d 737, 739 (6th Cir.) *cert. denied*, 368 U.S. 899, 82 S.Ct. 177, 7 L.Ed.2d 94 (1961).

By merely instructing the jury that Combs would be guilty of the crime charged in Count One if he possessed a rifle with a barrel of less than 16 inches and had made that rifle into a rifle having a barrel of less than 16 inches, the court incorrectly defined the

offense actually charged in Count One. The court substantially amended the indictment through its instructions to the jury and thus '"destroyed the defendant's substantial right to be tried only on charges presented in an indictment returned by a grand jury."' *United States v. Pazsint*, 703 F.2d 420, 424 (9th Cir. 1983) (quoting *Stirone v. United States*, 361 U.S. 212, 217, 80 S.Ct. 270, 273, 4 L.Ed.2d 252 (1960). The court broadened the possible basis for conviction in its instruction, and this constitutes reversible error. *United States v. Miller*, _____ U.S. ____, _____, 105 S.Ct. 1811, 1815, 85 L.Ed.2d 99 (1985). The court thus erred in rejecting Combs' proposed instructions. *See United States v. Tille*, 729 F.2d 615, 624 (9th Cir. 1984) (no error in rejecting requested instructions where court's instructions addressed all elements); *United States v. Lane*, 708

> F.2d 1394, 1397-98 (9th Cir. 1983)
>
> The court had no discretion to refuse to define the crime charged in terms of the very statutes whose violation constituted the crime. *See Morris*, 156 F.2d at 531-32. Without finding that Combs had violated sections 5821 or 5822, the jury could not properly return a guilty verdict under Count One."

Here, Instruction No. 50 did not serve to clarify "market value", but rather it was so lacking in explanation or standards by which to determine "market value" that it violated Mr. Atkinson's Fifth Amendment right to be tried only on charges presented in an Indictment and his right to due process of law and his Sixth Amendment right to be informed of the nature and cause of the accusation against him.

The Government would obviously argue that even if one theory or definition of "market value" was impermissible, any instructional error is harmless and Mr. Atkinson's convictions should stand because there remained a proper theory or definition of "market value" upon which the jury could base its verdict. Such an argument was addressed very clearly by the United States Court of Appeals in *United States v. Wentz*, 800 F.2d 1325 (4th Cir. 1986). In *Wentz*, the Defendant was charged under the National Stolen Property Act in connection with the theft of a boat. One element of these crimes is that the stolen property must have a value of at least Five Thousand and No/100ths ($5,000.00) Dollars. Following his conviction, Mr. Wentz contended that the trial judge improperly instructed the jury to consider not only the market value of the boat, but also its replacement value, a

measure that the Act does not permit. The Court addressed the argument of Mr. Wentz at page 1326 of its opinion and stated:

> "In the jury instruction that Wentz complains of, the court explained that the $5,000 value was an essential element of the offense. It then explained that value ordinarily means market value, that is the price a willing buyer would pay to a willing seller. Now if there is no testimony to support market value for the property, the jury is permitted to consider other reasonable methods of valuation, and among those other reasonable methods of valuation are such items as replacement value less the amount of depreciation that occurred during the time that the property was in the possession of its owner.
>
> The second measure of value, replacement value

less depreciation, would best have been left unsaid. Its meaning is not clear to us, nor could it have been clear to the jury. It may be akin to, if not the same as, the definition of value given in the Act. Whatever its meaning, its inclusion was neither necessary nor helpful.

We do not think, however, that the reference to 'replacement value less depreciation' in this instruction constitutes reversible error. The judge made clear to the jury that the customary measure of value was indeed market value. Market value was correctly defined for the jury. Most importantly, the court directed the jury to consider the alternative measure only if there was no testimony supporting market value. In fact, the jury received extensive testimony concerning market value. Two witnesses, the manager of a

> Bayliner dealership and a representative of the firm that insured the boat, testified that the boat had a market value over $5,000, testimony that made unnecessary the jury's consideration of any other method. Where evidence of replacement value was introduced apart from market value, the judge sustained defendant's objections, noting, 'What is relevant in this case is the fair market value of the boat immediately before the loss.' The only instance of testimony on replacement value permitted was where the witness 'made his explanation that that was about two thousand more' than the actual value of the boat."

In other words, the Court in *Wentz* found that the second measure of value was neither necessary nor

helpful, but the evidence was sufficient to convict Mr. Wentz using the first measure of market value.

In Mr. Atkinson's case, if the second method of determining "market value" was impermissible, was there sufficient evidence to convict Mr. Atkinson using the first method, namely the price a piece of property would bring if sold on the open market between a willing buyer and seller. Nearly all of the testimony regarding the price paid between a willing buyer and a willing seller was presented by Mr. Joel Scrafford, Resident Agent for the United States Fish and Wildlife Service. In that regard Agent Scrafford noted that none of the deer were of trophy status. He further testified that at wildlife sales conducted by Fish and Game, the entire animal was sold for approximately Thirty-five and No/100ths ($35.00) to One Hundred Fifty and No/100ths ($150.00) Dollars. This was really

the only testimony regarding "market value" using the first method. Obviously, there is not sufficient evidence to sustain the jurisdictional amount of Three Hundred Fifty and No/100th ($350.00) Dollars.

It should also be noted that Mr. Scrafford also presented what could be termed a third method of determining "market value" when he testified as to replacement cost. In that regard, he testified that it was appropriate to look at license fees, guide fees, airline transportation, taxidermy fees, cost of cold weather equipment, coats, and packs and miscellaneous food. Such a replacement cost has a low of Two Thousand Two Hundred Sixty and No/100ths ($2,260.00) Dollars and a high of Three Thousand Two Hundred and No/100ths ($3,200.00) Dollars for replacement value. Such testimony only adds to the confusion already generated by the ambiguous and

broad definition of "market value" set forth in the second method. When all of the facts are considered, the only conclusion is that Instruction No. 50 is vague and ambiguous and violates Mr. Atkinson's constitutional rights. Second, the evidence was insufficient, unlike *Wentz*, to sustain this crucial element when only the proper method for determining "market value" is used, namely the price a piece of property would bring if sold on the open market between a willing buyer and seller. The jury could not return a verdict of guilty on any of the 21 counts.

3. Whether the application to the Petitioner of Amendment Number 407 of Section 2Q2.1 of the Federal Sentencing Guidelelines violated the Ex Post Facto Clause of the United States Constitution?

At the sentencing of Mr. Atkinson, the District Court applied Section 2Q2.1 of the Federal Sentencing Guidelines to determine the offense level for Mr. Atkinson. Section 2Q2.1 provides a base offense level of six. To the base offense level, the Court added two levels if the offense involved a commercial purpose pursuant to Section 2Q2.1(b)(1). Mr. Atkinson did not object to that particular increase. However, the District Court also increased the offense level by four levels in applying Section 2Q2.1(b)(3)(A) which provides:

> "If the market value of the specially protected fish, wildlife, or plants exceeded $2,000, increase the offense level by the corresponding number of levels from the table in section 2F1.1 (Fraud and Deceit)"

The District Court went on to find that the market value of the wildlife was One Thousand Five Hundred and No/100ths ($1,500.00) Dollars for each of the 14 deer for a total of Twenty-one Thousand and No/100ths ($21,000.00) Dollars. Referring to the tables set forth in Section 2F1.1 (Fraud and Deceit), the offense level was increased four levels.

On appeal before the United States Court of Appeals for the Ninth Circuit, Mr. Atkinson argued that deer are not "specially protected fish, wildlife, or plants" as required by Section 2Q2.1(b)(3)(A). To assist the Court in understanding the significance of the "specially protected" language, Mr. Atkinson provided a brief history of this particular guideline.

Prior to November 1, 1989, there were two separate and distinct sentencing guidelines dealing with conservation and wildlife. Section 2Q2.1 was entitled

Specially Protected Fish, Wildlife, and Plants. One of the specific offense characteristics set forth at Section 2Q2.1(b)(3)(A) stated:

> "If the market value of the specially protected fish, wildlife, or plants exceeded $2,000, increase the offense level by the corresponding number of levels from the table in section 2F1.1 (Fraud and Deceit)."

The second guideline to deal with conservation and wildlife prior to November 1, 1989, was Section 2Q2.2 entitled Lacey Act; Smuggling and Otherwise Unlawfully Dealing in Fish, Wildlife, and Plants. This particular sentencing guideline made no mention of any "specially protected fish, wildlife, or plants". In other words, prior to November 1, 1989, offenses involving "specially protected" fish, wildlife, and plants would be dealt with in Section 2Q2.1 and offenses involving the

Lacey Act and ordinary fish, wildlife, or plants would be dealt with in Section 2Q2.2. However, on November 1, 1989, these two sentencing guidelines were amended, more specifically, Section 2Q2.2 involving the Lacey Act was deleted and combined into Section 2Q2.1. As a result, when these two sections were amended and combined, the United States Sentencing Commission decided to limit the special offense characteristic dealing with market value to only "specially protected fish, wildlife, or plants." The United States Sentencing Commission chose not to utilize the more general language as set forth in the previous Lacey Act guideline of Section 2Q2.2. Therefore, the special offense characteristic in effect at the time of the commission of the alleged offenses by Mr. Atkinson could only be applied if the offense involved "specially protected fish, wildlife, or plants."

The wildlife in this case do not fall within the definition of "specially protected wildlife."

Nevertheless, the United States Court of Appeals for the Ninth Circuit in its original opinion dated April 27, 1992 applied the specific offense characteristic to Mr. Atkinson as though the language "specially protected" did not exist. Mr. Atkinson filed a timely Petition for Rehearing, and said Petition for Rehearing was denied. Five days later, on July 22, 1992, the United States Court of Appeals for the Ninth Circuit issued its Order and Amended Opinion. The Court affirmed the sentence of Mr. Atkinson, cited Amendment 407 which deleted the langugage "specially protected" from Section 2Q2.1(b)(3)(A) which was effective after Mr. Atkinson's sentencing and stated at page 1276 of its opinion:

"We give substantial deference to a subsequent Guideline amendment 'when it plainly serves to clarify rather than change the existing law.' *United States v. Martinez*, 946 F.2d 100, 102 (9th Cir. 1991). It is clear from the commentary to the 1991 amendment that the deletion of the words 'specially protected' clarified, rather than changed, section 2Q2.1(b)(3)(A). U.S.S.G., app. C, amend. 407 (1991) ('this amendment removes language inadvertently retained when this guideline was consolidated with the former 2Q2.2'). This view is also supported by the 1990 commentary to section 2Q2.1(b)(3)(A). As this commentary shows, section 2Q2.1(b)(3)(A) was never intended to apply solely to 'specially protected' wildlife after its consolidation. Rather, it was intended to apply to violations of several different animal protection statutes, including

> the Lacey Act. *See* U.S.S.G. 2Q2.1 commentary (1990) ('[t]his section applies to violations of the . . . Lacey Act'). We therefore conclude there is no distinction between specially protected wildlife and wildlife taken in violation of the Lacey Act under the consolidated version of section 2Q2.1."

Mr. Atkinson contends that the application to Mr. Atkinson of Amendment 407 which deleted the language "specially protected" from Section 2Q2.1 violates the ex post facto clause of the United States Constitution.

Initially, it is important to set forth a brief recitation of the relevant dates in this particular case which is as follows:

1. Effective date of Amendment No. 209 which consolidated Section 2Q2.1 and

Section 2Q2.2 of the Federal Sentencing Guidelines -- November 1, 1989.

2. Dates of the alleged offenses as reflected in the Indictment -- November 6 through November 29, 1989.

3. Date of Imposition of Sentence -- February 8, 1991.

4. Effective date of Amendment No. 407 which deleted the language "specially protected" from Section 2Q2.1(b)(3)(A) -- November 1, 1991.

The United States Court of Appeals in its Amended Opinion attempts to circumvent the ex post facto problem by concluding that the deletion of the language is simply a clarification due to the fact that the explanation to Amendment No. 407 states:

> "This amendment removes language inadvertently retained when this guideline was consolidated with the former section 2Q2.2. The effective date of this

> amendment is November 1, 1991."

Nevertheless, the Sentencing Commission acknowledges that this is not some sort of clarification, but rather it is a deletion or a change. The Sentencing Commission admits that it made a mistake, not a clerical error or a typographical error, but a substantive mistake which requires a specific amendment. It is important to point out that Section 2Q2.1(b)(3)(A) was clear and unambiguous at the time that Mr. Atkinson was sentenced. There was absolutely no need to make reference to any type of commentary whatsoever. Of additional assistance is the decision by the United States Court of Appeals for the Ninth Circuit in *United States v. Martinez*, 946 F.2d 100 (9th Cir. 1991) where the Court stated:

"Here, however, where the circumstances surrounding the relevant guideline and its amendment fail to make clear that the amendment's purpose was merely to clarify rather than to alter pre-existing law, we will confer no weight on the subsequent amendment. *Cf., e.g., Consumer Product Safety Comm'n v. GTE Sylvania, Inc.*, 447 U.S. 102, 118 n. 13, 100 S.Ct. 2051, 2061 n. 13, 64 L.Ed.2d 766 (1980) ('[E]ven when it would otherwise be useful, subsequent legislative history will rarely override a reasonable interpretation of a statute that can be gleaned from its language and legislative history prior to its enactment.'). This is expecially so in the criminal law context where the rule of lenity requires that we infer the rationale most favorable to the appellants and construe the guidelines accordingly."

If this language is applied fairly to Amendment No. 407 which deleted the relevant language "specially protected", then it is obvious that the amendment failed to make clear that the amendment was merely to clarify. If that is the case, then no weight may be conferred on this subsequent Amendment No. 407.

On the other hand, if weight is given to Amendment No. 407, then reference need be made to the decision by the Supreme Court of the United States in *Miller v. Florida*, 482 U.S. 423 (1987). In *Miller*, the Supreme Court of the United States was faced with an amendment made to the sentencing guidelines of the State of Florida. At the time the Defendant committed the sexual battery and the other offenses for which he was later convicted in a Florida Trial Court, the statute provided a presumptive sentence range of three and one-half to four and

one-half years imprisonment. The sentencing guidelines were later revised to increase the number of points assigned to sexual offenses, and at the time the Defendant was sentenced, the guidelines called for a presumptive sentence of five and one-half to seven years in prison. The Judge who sentenced the Defendant applied the amended guidelines and imposed a seven year sentence.

On Certiorari, the United States Supreme Court expressed the unanimous view of the Court that the revised Sentencing Guidelines Statute, as applied to the Defendant, whose crimes occurred before the statute's effective date, violated the ex post facto clause of the Federal Constitution, namely Article I, Section 10. In so holding, the Court utilized the test set forth at 96 L.Ed. 2d 360 which provides:

> "Our test for determining whether a criminal law is ex post facto derives from these principles. As was stated in Weaver, to fall within the ex post facto prohibiton, two critical elements must be present: first, the law 'must be retrospective, that is, it must apply to events occurring before its enactment'; and second, 'it must disadvantage the offender affected by it.' Id., at 29, 67 L Ed 2 17, 101 S Ct 960. We have also held in Dobbert v. Florida, 432 US 282, 53 L Ed 2d 344, 97 S Ct. 2290 (1977), that no ex post facto violation occurs if a change does not alter 'substantial personal rights,' but merely changes 'modes of procedure which do not affect matters of substance.'"

Keeping in mind the above quoted language, the first prong is that the law must be retrospective, and it

is deemed retrospective if it changes the legal consequences of acts completed before its effective date. Here, Amendment No. 407 whose effective date was November 1, 1991, and which deleted the language "specially protected", has certainly been applied along with the commentary of the amendment to Mr. Atkinson's offense which was alleged to have been committed in November of 1989. One could argue that the amendment and its commentary were not applied retroactively, rather the Court was simply interpreting the language of the guideline which existed in November of 1989 at the time of the alleged offense. However, the language which existed at the time of the offense, namely November of 1989, did not require interpretation. Rather, what the United States Court of Appeals for the Ninth Circuit did was basically omit or delete language which is precisely what Amendment

407 accomplished. Additionally, the deletion of existing language is precisely what occurred in *United States v. Suarez*, 911 F.2d 1016 (5th Cir. 1990) in which the United States Court of Appeals for the Fifth Circuit was confronted with an amendment to Section 1B1.3 in which the language of that section was deleted regarding the Defendant's state of mind. The purpose of the amendment was to delete language which was viewed as "unnecessary." The Court found that because the amended section increased the Defendant's punishment, the amendment was not simply a change in procedure which does not affect a matter of substance. Very simply, the Court found that the deletion of the language was a substantive change as opposed to a clarification. Returning to the case at bar, there is no doubt that Amendment No. 407 has been applied to events occurring prior to its effective

date, November 1, 1991. The first prong of the test is satisfied.

The second prong of the test is that the amendment must disadvantage the offender affected by it. Here, the Court's application of Amendment No. 407 resulted in an increase of four levels which resulted in Mr. Atkinson's final offense level of 18, which, together with his criminal history category, resulted in a sentencing range of 30 - 37 months. Mr. Atkinson was then sentenced to 37 months. Had the increase pursuant to Section 2Q2.1(b)(3)(A) only applied to "specially protected" wildlife, Mr. Atkinson's offense level would have been offence level 14 with a sentencing range of 18 - 24 months. As the Court in *Suarez* noted, the change alters the length of time that the Defendant spends in prison. As such, there is no doubt that the deletion of the language "specially

protected" and the application of Amendment No. 407 clearly disadvantaged Mr. Atkinson and the second prong of the test is clearly satisfied.

Once again, when all of the facts and relevant law are considered, the only conclusion that can be drawn is that the application of Amendment No. 407 to Mr. Atkinson violates the ex post facto clause of the Federal Constitution.

CONCLUSION

For the reasons stated and the authorities cited, the Petitioner, Melville O'Neal Atkinson, prays that this Honorable Court grant his Petition for a Writ of Certiorari.

DONE AND DATED this 9th day of December, 1992.

MOSES LAW FIRM
P. O. Box 2533
Billings, Montana 59103

By: _____
Jay F. Lansing

ATTORNEYS FOR
PETITIONER

FILING AND SERVICE VERIFICATION

STATE OF MONTANA)
: ss.
County of Yellowstone)

JAY F. LANSING, of legal age, being first duly sworn on his oath, deposes and says that he is the attorney for Petitioner herein, and that he personally has deposited said Petition at the United States Post Office in Billings, Montana, by first class mail, postage prepaid and properly addressed to the Clerk of this

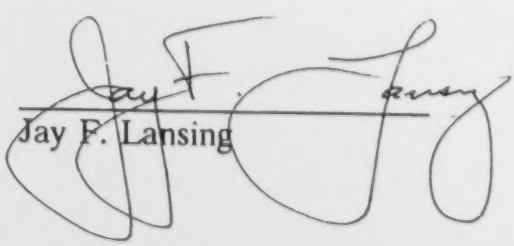
Court on the 9th day of December, 1992, which is timely as within 90 days of the date of denial of Petitioner's Petition for Rehearing by the United States Court of Appeals for the Ninth Circuit on September 10, 1992.

Affiant further states that this Petition was at such times and place served by mail on the Respondent United States of America by mailing three copies thereof to:

Solicitor General
Department of Justice
Washington, D.C. 20530

and three copies thereof to:

Kris A. McLean
Assistant United States Attorney
Federal Building
Drawer 10031
Helena, Montana 596267



Jay F. Lansing

SUBSCRIBED AND SWORN to before me this

9th day of December, 1992.

Charlotte L. Sears

Notary Public for the State of Montana
Residing at Huntley, MT
My Commission Expires: 1/31/95